UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEREMY LEVIN and DR. LUCILLE LEVIN,

Plaintiffs,

-v-

BANK OF NEW YORK, JP MORGAN CHASE, SOCIETE GENERALE and CITIBANK,

Defendants.

THE BANK OF NEW YORK MELLON,

Third-Party Plaintiff,

-v-

[redacted]

JPMORGAN CHASE BANK, N.A.,

Third-Party Plaintiff,

-v-

[redacted]

CAPTION CONTINUED ON NEXT PAGE

(FILED PARTIALLY UNDER SEAL DUE TO CONFIDENTIAL INFORMATION PER ORDER DATED JANUARY 21, 2010)

Civ. No. 09 CV 5900 (RPP)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR 28 U.S.C. § 1292(b) CERTIFICATION OF THE COURT'S OPINION AND ORDER DATED JANUARY 20, 2011

[Notice of Motion and Motion for 28 U.S.C. § 1292(b) Certification Filed Concurrently Herewith]

HEARING DATE: February 15, 2011, (Requested by Letter to the Court, dated February 1, 2011 but Moving Party Is Prepared to Submit on the Briefs without Argument)
TIME: 3:00 PM
PLACE: Courtroom 24A

SOCIETE GENERALE,

Third-Party Plaintiff,

-v-

[redacted]

Civ. No. 09 CV 5900 (RPP)

CITIBANK, N.A.,

Third-Party Plaintiff,

-v-

[redacted]

THE BANK OF NEW YORK MELLON, JPMORGAN CHASE, N.A., SOCIETE GENERALE and CITIBANK, N.A.,

Third-Party Plaintiffs,

-v-

STEVEN M. GREENBAUM, et al.

Third-Party Defendants.

CAPTION CONTINUED ON NEXT PAGE

THE BANK OF NEW YORK MELLON, JPMORGAN CHASE BANK, N.A., SOCIETE GENERALE and CITIBANK, N.A., Third-Party Plaintiffs, -v- THE ESTATE OF JAMES SILVIA AND LYNNE MICHOL SPENCER, et al., Third-Party Defendants.	Civ. No. 09 CV 5900 (RPP)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR 28 U.S.C. § 1292(b) CERTIFICATION OF THE COURT'S OPINION AND ORDER DATED JANUARY 20, 2011

I. INTRODUCTION

On July 13, 2010, Plaintiffs Jeremy and Dr. Lucille Levin ("Levins" or "Petitioners" or "Plaintiffs" or "Judgment Creditors") filed a motion seeking partial summary judgment and a turnover order as to each garnishee bank, Bank of New York Mellon, N.A. ("BNY" or "Bank of New York"), Societe Generale ("SG"), Citibank, N.A. ("Citibank") and JP Morgan Chase Bank, N.A. ("JPMorgan") (collectively "New York Banks," "Defendant Banks," or "Garnishees"); seeking summary judgment as to the interpleader complaint of SG; and seeking partial summary judgment as to third party defendant Iranian Judgment Creditors and other third party defendant banks and/or agencies or instrumentalities of the Islamic Republic of Iran ("Iran"). The only parties opposing the Levins' motion were Greenbaum/Acosta and Heiser Judgment Creditors, who also filed cross motions for partial summary judgment as to some but not all the accounts in the Levins' motion. *See* September 13, 2010 Heisers' Opposition to Levins' MSJ and Cross-Motion for Partial Summary Judgment; and Spetember 13, 2010 Greenbaum and Acosta's Opposition to Levins' MSJ and Cross-Motion for Partial Summary Judgment.[1] The Greenbaum, Acosta and Heiser Judgment Creditors are third party defendants and they served their writs long after the Levins obtained their writs and began this action. These parties only opposed the Levins' Motion as it pertained to certain accounts, not all the accounts at issue in the Levins' Motion.[2] On January 20, 2011, the Court entered an order denying the Levins' Motion, denying the Heiser Judgment Creditors' Cross Motion and granting the Greenbaum and Acosta Judgment Creditors' Cross Motion. *See* Order dated January 20, 2011. The Court's Order directs the Defendant Banks to pay over certain specific OFAC blocked assets being held by Defendant Banks to the Greenbaum and Acosta Judgment Creditors and also purports to "discharge" the Banks from futher liability for these accounts after they pay over the proceeds. *Id*. The basis for the Court's order in favor of the Greenbaum and Acosta

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[1] Defendant Bank of New York Mellon opposed the Heiser Cross Motion for summary judgment solely on the basis that their writs which were issued under Maryland law did not comply with New York collection statutes. *See* October 26, 2010 Bank of New York Mellon's Memorandum of Law With Respect to Whether a Writ of Garnishment Issued in the State of Maryland Reaches Assets Located in the State of New York. The Banks did not oppose the Levins' motion and did not take the position that the Levins' writs were invalid under federal law or New York law.

[2] Neither the Greenbaum/Acosta judgment creditors nor the Heiser judgment creditors made any claims on the Societe Generale funds.

Judgment Creditors third party defendants and against the Levin Plaintiffs[3] is the Court's interpretation as a matter of law that 28 U.S.C. § 1605(a)(7) judgment holders, victims of terrorism, seeking to collect blocked assets under TRIA[4] and/or 28 U.S.C. §1610 (f)(1)(a), which are already frozen and attached by the executive branch under federal law, must seek a court ordered rather than a clerk issued writ (valid in every other way) in order to establish their priority under the FSIA[5], where their writs are first in time and they initiated the collection action. This is a pure question of law and a matter of first impression. There is no case interpreting the current language of the FSIA and TRIA sections at issue in the context of collection of blocked assets to satisfy judgments held by victims of terrorism.

Plaintiffs, on receiving the Court's January 20, 2011 Order, sent the Court a letter asking that it certify the Order for 28 U.S.C. § 1292(b) review. In response, the Greenbaum and Acosta Judgment Creditors third party defendants wrote to the Court saying they objected to the certification and that the Levins should file a formal motion if they sought such treatment. *See* January 26, 2011 Letter to Hon. Patterson from James Bernard. Since the Greenbaum and Acosta Judgment Creditors third party defendants object to 28 U.S.C. § 1292(b) certification, the Levins file this formal motion. The

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[3] In awarding the Blocked Assets to the Greenbaum and Acosta Judgment Creditors third party defendants, the Court used all the evidence and work done by the Levins to prove the elements required to collect their judgment against Iran and its agencies as support for the Greenbaum and Acosta Judgment Creditors' claims. *See* Order dated January 20, 2011.

[4] Codified as a note to 28 U.S.C. §1610.

[5] 28 U.S.C. § 1610(a), (b) & (c).

Levins do not think there is a need for oral argument and if the Court agrees are prepared to submit the issue to the Court based on the briefs.[6]

The Levins request that the Court certify for appeal under 28 U.S.C. §1292(b), its January 20, 2011 Opinion and Order on the issue of whether a court issued writ of execution is sufficient to establish priority under current 28 U.S.C. § 1610 (Foreign Sovereign Immunities Act or FSIA), including the note thereto (Terrorist Risk Insurance Act or TRIA), for a 28 U.S.C. §1605(a)(7) judgment specifically seeking to levy on assets set forth in TRIA and/or 28 U.S.C. § 1610(f)(1)(a) and the issue of whether a discharge of the Banks holding such assets is proper before the priority has been finally established after appeal.

As the Court is aware, 28 U.S.C. §1292(b) allows certification of orders that: "(1) involve controlling question[s] of law (2) over which there is substantial ground for difference of opinion" . . . and "(3) an immediate appeal would materially advance the ultimate termination of the litigation." *Consub Delaware LLC v. Schahin Engenharia Limitada*, 476 F.Supp.2d 305 (S.D.N.Y. 2007) (certifying a 28 U.S.C. §1292(b) appeal on the issue of whether certain ETFs were attachable). The Levins believe that the Court's Order holding their writs void because they were court issued but not court ordered fits all the requirements for certification and it would be in the interest of the Court, as well

[6] The Levins also believe that this case is immediately available for appellate review under *S.E.C. v. Credit Bancorp., Ltd.*, 297 F.3d 127 (2d Cir. 2002), but it would be best to have 28 U.S.C. § 1292(b) certification so the Second Circuit is aware that the Court also agrees that this issue should be reviewed without delay. There are also grounds for entry of a FRCP 54(b) judgment. Such a judgment should be accompanied by a stay of execution, so that the assets remain blocked and held by the Defendant Banks until the proper recipient is finally determined, and no party should be required to post a bond.

as all the parties herein, to have immediate appellate review of this issue of first impression not only in the Second Circuit but anywhere.

I. Controlling Issue of Law

a. Impact on Future Litigation

In deciding whether an issue is a controlling issue of law, courts "may properly consider the system-wide costs and benefits of allowing the appeal. In other words, the impact that an appeal will have on other cases is a factor that we may take into account in deciding whether to accept an appeal." *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Mootnave Achille Lauro in Amministrazione Straordinaria*, et al., 921 F.2d 21, (1990)(accepting a 28 U.S.C. §1292(b) appeal on the issue of jurisdiction over the PLO). Here, the Phase Two accounts and any other accounts that may be frozen in the future will be impacted by the Court's order regarding the validity of the Levins' writs. Obviously, the Court's order and the impact of an appellate decision will affect the Levins' claims and others' claims for the remaining Phase One assets and the Phase Two assets. Additionally, plaintiffs believe based on the filings and representations of other parties that there are other similar cases involving the priority of court issued writs under 28 U.S.C. § 1610 involving both 28 U.S.C. § 1605A judgments and 28 U.S.C. § 1605(a)(7) cases. A ruling by the Second Circuit will determine whether the Levins have a basis to go forward in this litigation and whether indeed they must have court ordered writs (which are not possible to obtain now because they would invalidate their earlier writs, changing their priority position). *See Kitson & Kitson v. City of Yonkers,* 778 N.Y.S.2d 503, 508 (N.Y. App. Div. 2004).[7]

b. Pure Question of law

The issue of whether the Levins' writs are valid is a pure question of law that will not require the appellate court to look into the details of the record: "In regard to the first prong, the 'question of law' must refer to a 'pure' question of law that the reviewing court could decide quickly and cleanly without having to study the record." *Consub Delaware LLC v. Schahin Engenharia Limitada,* 476 F.Supp.2d 305 (S.D.N.Y. 2007). Here, the Second Circuit would only have to decide the pure issues of law of whether the Levins' writs are invalid because they are court issued pursuant to federal and state law, rather than court ordered. The Second Circuit will only have to examine limited undisputed facts and the law concerning statutory construction to affirm or reverse this Court's order.

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[7] As for the Citibank and JPMorgan Chase accounts, an argument might be made that these could be certified under Fed R Civ Pro 54(b) as there are separate accounts involved here. But since different accounts set forth in the Levins' complaint will then have different procedural postures, it makes sense to certify the overriding legal questions applying to all accounts together at once under 28 U.S.C. §1292(b). This will also preserve the status quo as to assets blocked by virtue of an order of the United States government (OFAC) and prevent any money being paid out or discharge of the entities affected by OFAC orders and regulations before the issue of whose writs under the statute entitle whom to priority, is finally resolved. It is possible that a 54(b) certification, including a stay of any enforcement, plus no discharge until the legal issue is decided by the Second Circuit and no bonding requirements would be an alternative. In other words, fairness requires that the issue be brought before the Second Circuit as soon as possible, maintaining the status quo, with as little further cost in order to obtain the Second Circuit's ruling as possible.

c. Controlling Issue Materially Affects the Litigation's Outcome

In deciding whether the first prong is met, Courts also look to see whether "at a minimum that determination of the issue on appeal would materially affect the litigation's outcome." *Consub Delaware LLC v. Schahin Engenharia Limitada*, 476 F.Supp.2d 305 (S.D.N.Y. 2007). Clearly, whether the Levins' writs are valid impacts the outcome here for both Phase One and Phase Two Accounts.

II. Substantial Ground for Difference of Opinion

The second prong that must be met to certify a question for appeal is whether there is substantial ground for difference of opinion. There is such substantial ground when "(1) there is conflicting authority on the issues, or (2) the issue is particularly difficult and of first impression for the Second Circuit." *Consub Delaware LLC v. Schahin Engenharia Limitada*, 476 F.Supp.2d 305 (S.D.N.Y. 2007). Here, the issues of statutory construction of current 28 U.S.C. § 1610 (a)-(c) and 28 U.S.C. § 1610(f)(1)(a) and the proper application of the rules for collection of 28 U.S.C. § 1605(a)(7) and 1605A judgments are issues of first impression. There are literally hundreds of judgments which have been entered under these statutes, many in reliance on the literal language of the statute. For example, the Levins obtained court issued writs because the face of the statute did not list 28 U.S.C. § 1605(a)(7) judgments in 28 U.S.C. § 1605(a)-(c) and TRIA and 28 U.S.C. § 1610(f)(1)(a) do not list a requirement for a court ordered writ at all. *See* January 21, 2011 Order. While this court has made a determination against the Levins' interpretation, the issue is not one without particular difficulty.

In their letter, the Greenbaum and Acosta Third Party Defendants claim that the issues have been settled by various cases in the Southern District of New York and by the House Report, which the Court cites in its January 20, 2011 Order, namely *First City, Texas Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 256 (S.D.N.Y. 2000); *Ferrostaal Metals Corp. V. S.S. Lash Pacifico*, 652 F. supp. 420, 423 (S.D.N.Y. 1987); *Gadsby & Hannah v. Socialist Republic of Romania*, 698 F. Supp. 483, 485 (S.D.N.Y. 1988); and H.R. Rep. No. 1487, 94th Cong., 2d Sess. 40, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6629. TRIA was enacted in 2002. The Amendments to the FSIA at issue, current 28 U.S.C. § 1610 (a)-(c) and 28 U.S.C. § 1610(f)(1)(a), were enacted in 2008 and 1999 respectively. The H.R. Report language quoted is from 1976. Congress was not addressing OFAC blocked assets under TRIA obviously in this Report. Also, the cases cited predate TRIA and the current FSIA amendments. *See Id*. They were not dealing with OFAC blocked and previously attached assets, but solely with procedures involving commercial contracts and assets which were being attached exclusively by the actions of private parties in litigation, not government attached and blocked assets, where court ordered writs are required. *See Id*. Thus, any claim or argument that these authorities determine the issue must fail.

III. An Immediate Appeal Would Materially Advance the Ultimate Termination of the Litigation

In this action, there are Phase Two accounts and there may possibly be future accounts that have been or will be frozen by OFAC. And a resolution as to the Levins' rights will materially advance the ultimate termination of the litigation because an adverse ruling as to the Levins will preclude them from continuing litigation on the accounts. Further, the procedural posture currently as to the Societe Generale and Bank of New York Mellon accounts is that the Court has denied both the Levins' and Heisers' motions for summary judgment. No party making a claim on these accounts is left, and the next step after summary judgment is trial. There would be no point to a trial where the Court has made a dispositive ruling as a matter of overarching law.

Dated: February 1, 2011

HOWARTH & SMITH

By: /s/Suzelle M. Smith

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